Before the
FEDERAL COMMUNICATIONS COMMISSION 94-285
Washington, D.C. 20554

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JUN 19 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	
of the Communications Act -	)	PP Docket No. 93-253
Competitive Bidding	)	

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To: The Commission

COMMENTS OF PCS FUND AND NPPCA
REGARDING JUNE 13, 1995 PUBLIC NOTICE ANNOUNCING
DELAY IN FILING FCC FORM 175 FOR C BLOCK PCS AUCTION

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1. Summary. The auction should proceed on August 2, 1995 under the existing rules with slightly modified procedures for the filing of FCC Form 175s. The parties set forth below, through counsel, hereby summit these comments in support of the continuation of the Federal Communications Commission's ("FCC") "entrepreneurs' block" auction rules in the aftermath of the June 12, 1995 decision by the United States Supreme Court in Adarand Constructors, Inc. v. Federico Pena, Secretary of Transportation, et al. ("Adarand"), No. 93-1841 (1995). After the Adarand decision, the "FCC decided to temporarily suspend the filing deadline for the [FCC] Form 175 applications to give both the Commission and potential applicants time to analyze the Supreme Court's decision. The Commission anticipates that a new filing deadline for the short-form applications will be announced shortly and that the auction will commence on August 2nd." FCC Public Notice of June 13, 1995.

The parties hereto recommend that the FCC Form 175s be due no later than June 28, 1995 and their evaluation expedited. The 175s should be modified to give all parties the opportunity to make a showing as to why their enterprise is or has been "disadvantaged" and

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should be eligible for preferences and bid credits. Minorities and women are presumed to be "disadvantaged", but must still demonstrate such. Other participants in the entrepreneurs' block would also be eligible for preferences and bidding credits, but would be required to make a showing that justified their status as a "disadvantaged enterprise". Additionally, the parties recommend that upfront payments, now scheduled for deposit July 11, 1995, be delayed until July 19, 1995.

2. Background. The difficulty in accessing capital was acknowledged in a recent finding by Congress when it mandated that the FCC "promote economic opportunity and competition to ensure that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women (emphasis added)," collectively known as designated entities ("DEs"). 47 U.S.C. § 309(j)(3)(B).[1] Additionally, the Congress was well aware that

[1] Entrepreneur's Block. The FCC established the "entrepreneurs' block" to ensure diversity among the new owners of PCS licenses. Companies in the entrepreneurs' block had to meet financial criteria before they were eligible to compete, ensuring that only smaller companies were allowed to compete for FCC licenses in the C Block. Specifically, they had to have less than $125 million in gross revenues in each of the last two years, and less than $500 million in total assets at the time the applicant files the FCC Form 175. Fifth Memorandum Opinion and Order ("MMO") in PP Docket No. 93-253, FCC 94-285, Released November 23, 1994 at ¶ 17.

The FCC elected to "retain a single gross revenue size standard, which is an established method for determining size eligibility for various kinds of federal programs that aid small businesses." Id. at ¶ 23. The "$125 million gross revenue test represents an appropriate benchmark for entry into the entrepreneurs' block, given our interest in including firms that, while not large in comparison to other telecommunications companies, are likely to have the financial resources to compete against larger competitors on the MTA Blocks." Id. at ¶ 24. Thus, the financial criteria aspect of the entrepreneurs' block was a means of ensuring that there would be diversity among PCS licensees, by providing a chance for smaller businesses to compete for licenses.

DEs have not had adequate access to capital, and in the legislative history accompanying the FCC grant of authority to conduct auctions it also states generally that the FCC "must promote economic opportunity and competition." See H.R. Rep. No. 111, 103rd Cong. 1st Sess. 254 (1993). In its mandate to the FCC, Congress acknowledged that diversity among licensees was critical to ensuring competition.

3. DE Preferences for Small, Women, and Minority-Owned Businesses. Within the entrepreneurs' block, acknowledging the capital constraints faced by small companies, the FCC created DE provisions that included bidding credits and installment payment options. The bidding preference allows the bidder to bid a higher price than they could otherwise. For instance, small businesses, characterized as having under $40 million in revenues for the three preceding years, are eligible for a 10% bid credit towards a winning bid. MOO at ¶ 97. Minority and women-owned businesses exist when 50.1% of the controlling group or all of the general partnership interests, are owned by minorities and/or women. Id. at ¶ 64. Minority and women-owned businesses are eligible for a 15% bid credit on a winning bid. Id. at ¶ 97. If a small business is minority or women-owned, then that entity is eligible for a 25% bid credit. Id. The FCC stated that "bidding credits would function as a discount on the bid price a firm will actually have to pay to obtain a license and thus, would directly address the obstacles to raising capital encountered by small [businesses], women and minority-owned firms. Id. Thus, the FCC current rules call for special recognition of the unique status of most women and minority-owned firms. The FCC should continue to recognize unique status of women and minority-owned firms as they modify the existing rules and regulations, as set forth herein.

The FCC's installment payment plans enable the respective winning bidders, regardless of gross revenues, to pay for their licenses over time. Id. at ¶ 103. However, the terms for smaller businesses with revenues under $75 million will be more generous because they are less able to access traditional sources of capital. Id. More specifically, entrepreneurs with gross revenues exceeding $75 million will be required to make a post-auction down payment equaling ten percent of their winning bids, but then pay the remaining 90% of the auction price in installments with interest charges to be fixed at the time of licensing at a rate equal to that for ten year U.S. Treasury obligations plus 3.5%, with payments on both interest and principal required. Id. Acknowledging the challenge facing these smaller licensees, the FCC envisioned that "the installment plans [would] greatly enhance the ability of all entrepreneurs' block participants to raise capital to succeed against major, well-capitalized competitors." Id. As discussed below, the procedure awarding the foregoing bidding preferences should be slightly modified to make them individually awarded in order to be narrowly tailored to address a congressionally acknowledged obstacle faced by small minority and women-owned companies competing in the telecommunications industry.

4. Adarand.

In Adarand[2], the Supreme Court vacated the decision of the Court of Appeals and

[2] In Adarand, the Central Federal Lands Highway Division, part of the United States Department of Transportation ("DOT"), awarded the contract for a highway construction project in Colorado to Mountain Gravel & Construction Company ("Mountain"). Adarand Constructors submitted the low bid, but failed to win the contract. Due to a provision in the terms of the DOT contract, Mountain would receive additional compensation if it hired a subcontractor certified as small businesses controlled by "socially and economically disadvantaged individuals." Despite its low bid, Adarand Constructors lost the contract to Gonzales Construction Company, an entity certified as a small disadvantaged business. Thereafter, Adarand Constructors filed suit against the DOT in federal court, claiming that race-based presumptions used in

remanded the case so that the District Court could apply the correct standard, as articulated in the decision. The Court held that the proper standard for analyzing all racial classifications is strict scrutiny rather than "intermediate scrutiny", regardless of whether the action originates from a federal, state, or local actor. See Adarand at 25-26. Thus, in order for a racial classification to be constitutional, it must be narrowly tailored to further a compelling governmental interest. Id.

Finally, it is worth noting that at this time the DOT has decided not to change its policies because the agency believes this affirmative action program will satisfy the strict scrutiny standard--although the DOT is preparing for the challenge, and a number of private companies have publicly stated that they intend to maintain their affirmative action programs.

5. Following *Adarand*, the FCC Should Institute Two Slight Changes. The two slight changes proposed will not disrupt the current auction date of August 2, 1995, and are as follows:

> a) An FCC Public Notice should be issued confirming the use of a "strict scrutiny" standard for all minority and women applicants requesting preferences and bidding credits, to eliminate any and all "shams" that may attempt to abuse the FCC's rules. Additionally, the FCC should advise them of their option not to use the preference and bidding credits simply by not electing to check the appropriate box(s) on the FCC Form 175.
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> b) The Public Notice should also announce the FCC's modification of its Form 175 procedures by requiring all applicants desiring to use preferences and bidding credits to submit an attachment to the Form 175, that identifies why they should be considered to be "disadvantaged". Such an attachment should identify prior experiences of discrimination, financial need, other personal experiences, and societal impediments which the applicant overcame or must overcome. To reduce the administrative burden, this attachment should not exceed four pages.

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subcontractor compensation clauses violate the equal protection component of the Fifth Amendment's Due Process Clause. Both the District and Appeals Courts held for the DOT, using an immediate scrutiny standard.

Minorities and women will be presumed "disadvantaged", but still must demonstrate such. Other participants in the entrepreneurs' block would also be eligible for preferences and bidding credits, but would be required to make a showing that justified their status as a "disadvantaged enterprise". This supplement will allow the FCC to make an individualized determination on a "case by case" basis as to whether the bidder should receive preferences and bidding credits. This procedure would not guarantee preferences for any racial group or gender classification, nor would it exclude any applicant from receiving benefits, should the bidder establish their status as a "disadvantaged business". See Adarand.

6. The FCC's Bidding Preferences in PCS as Modified Herein Will be Constitutional. The FCC's bidding preferences are constitutional because they further compelling governmental interests. The compelling governmental interests are to ensure meaningful competition in the telecommunications industry, and to ensure viewpoint diversity, pursuant to the First Amendment.

Congress has determined that one way to foster competition in the telecommunication industry is to have diversity among FCC licensees. Congress has determined that the largest obstacle faced by smaller businesses in attempting to compete in the telecommunications industry is their inability to access adequate capital. Thus, in order to address their financial obstacles, Congress mandated that the FCC create rules to address such obstacles.

With a congressional mandate, the FCC created the entrepreneurs' block with DE provisions. Acknowledging the financial obstacles faced by small businesses in competing in the telecommunications industry, the entrepreneurs' block was created with financial criteria, ensuring diversity in the ownership of FCC licensees. The entrepreneurs' block financial criteria was established based on a gross revenue standard, an established method for determining size eligibility for various kinds of federal programs that aid small businesses.

In order to aid the small businesses owned by minorities and women, the FCC created bidding preferences that consisted of bidding credits and installment payments because of their lack of access to traditional sources of capital. The bidding credits enable the smaller businesses to meaningfully bid for the PCS licenses, and the installment payments afford them adequate time to successfully pay for the licenses while building the infrastructure necessary to activate the licenses. Thus, they are narrowly tailored to address the foregoing compelling governmental interest.

Further, the foregoing Form 175 supplement would allow the FCC the opportunity to individually determine, under strict scrutiny, whether to grant the applicant preferences and bidding credits. This alleviates the FCC from making blanket presumptions based on access to capital, personal history, and personal experience. Utilization of this method would also not result in the delays that would accompany a formal rulemaking. Such analysis is only required if the applicant intends to utilize the preferences and bidding credits.

With the convergence of technologies today and in the future, PCS is also implicated as a source of information and viewpoints. The importance of a diversity of viewpoints holding in Metro Broadcasting, Inc. v. FCC ("Metro"), 497 U.S. 547, 566 (1990), pursuant to the First Amendment, was not struck down by the holding in Adarand. Only the intermediate standard of review in Metro was struck down by Adarand. Adarand at 25-26.

There remains a compelling governmental interest in ensuring the existence of broadcast diversity, reflective of the diverse population of America. In Metro, the Court held that

"Congress and the FCC have selected the minority ownership policies primarily to promote programming diversity, and they urge that such diversity is an important governmental objective that can serve as a constitutional basis for the preference policies." Metro at 566. Further, the Court added that "Safeguarding the public's right to receive diversity of views and information over the airwaves is therefore an integral component of the FCC's mission." Id. at 567. That responsibility has not changed, and it is imperative that the FCC remain vigilant about viewpoint diversity as technologies converge, and ensure broadcast diversity as PCS and other technologies becomes a sources of information and differing viewpoints.

7. Negative Impacts of Delaying the PCS Auction. The FCC cannot please everyone. As such, any major rule change requiring a notice of proposed rulemaking ("NPRM") will cause new problems, such as additional filings or lawsuits by those in favor of the existing rules, or permitting opposition to the newly proposed rules. Also, a NPRM will take months to complete, and the final result could be challenged at the D.C. Circuit Court of Appeals. Further, with each passing day, the A and B Block winners continue to advance in their build-outs, lessening the value of C Block licenses and diminishing the potential revenues for the federal government from the auction.

The reason for establishing the entrepreneurs' block was inadequate capital for small businesses. Those investing in the C Block bidders are already concerned about the head-start the A and B Block licensees have, and a delay in the auction date at this point could cause already scarce investment capital to all but evaporate. The uncertainty that a delay at this critical point would cause could never be alleviated, potentially exhausting all but a few DEs, and not adding any meaningful competition to the telecommunications industry.

It is critical that the August 2, 1995 date be maintained because the likelihood of auction participants challenging each other is relatively low. The few bidders who are not successful, may bring actions against those in specific markets, allowing the vast majority of winners to have the licenses awarded without delay.

8. Based on FCC Rules, a Stay at This Late Juncture is Unlikely. A challenge to the FCC's current rules or procedures, as modified herein, would not be timely enough to get through the agency's administrative processes to thereafter obtain a stay from the D.C. Circuit Court of Appeals. Under the proposal herein, no party would be able to challenge the FCC's procedure until its request to be a "disadvantaged business" was denied, and as such, the challenge would be on its individual status rather than on the validity of the overall auction. With only six weeks prior to the auction, there is inadequate time to successfully acquire a stay of the auction.

Further, once the auction has commenced, the likelihood that a court would issue a stay significantly decreases. The proposal herein, would permit a post-auction challenge only to the winning bidders receiving the preferences.

9. Conclusion. The FCC Form 175s, as modified as set forth above, should be due no later than June 28, 1995 and their evaluation expedited. Upfront payments, now scheduled for deposit July 11, 1995, should be delayed until July 19, 1995. Under any circumstance, the auction should commence on August 2, 1995.

Bidding credits and installment payments for "disadvantaged businesses" in the entrepreneurs' block, pursuant to the procedures outlined above, would in fact be narrowly tailored to further compelling governmental interests, greater competition and viewpoint diversity.

If the auction does not proceed as scheduled, the DE bidders in the C Block will face tremendous financial hardship because their investors will probably seek other opportunities due to the continuing uncertainty of the FCC rules and procedures. Thereafter, small businesses will forever be precluded from competing via a meaningful ownership stake in PCS, and that outcome cannot be allowed to occur as we enter the information millennia.

Respectfully submitted,

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